The structure of the program approved below allows the District Director to act and award without any effective judicial or legislative oversight. Under the current scheme, a LHWCA employer cannot meaningfully protect its interests. This Court should grant review to restore the LHWCA benefits award scheme that was enacted by Congress.

ARGUMENT

1. The OWCP has created an extra-statutory award of benefits that conflicts with the Congressional definition of "disability" found in the LHWCA

The award at issue is extra-statutory. The court below affirmed an award of total disability compensation to a worker who did not meet the criteria for "disability" as that term is defined by Congress in the LHWCA. 33 U.S.C. § 902(10). Robert Castro injured his right knee while engaged in the course and scope of employment covered by the LHWCA. Normally, after reaching maximum healing, Castro would be entitled an award of compensation of a defined number of weeks based on the amount of impairment to his leg as discussed below. 33 U.S.C. § 908(c)(2). Instead, he was placed into a full-time OWCP-approved vocational rehabilitation program to train to be an entry-level hotel clerk. At a formal hearing before the OALJ, Castro's employer, General Construction Company, established that Castro had a wage- earning capacity and was not totally "disabled" within the meaning of the LHWCA. Despite finding that Castro had a wage-earning capacity, the ALJ nevertheless awarded Castro benefits for total disability on the ground that Castro was precluded from working because he was enrolled in a vocational rehabilitation program.

The text of the LHWCA does not provide for the payment of disability compensation benefits to workers on the basis of enrollment in vocational rehabilitation. The court

below admitted this. *General Construction Co. v. Castro*, 401 F.3d 963, 971 (9th Cir. 2005). Such awards are in direct opposition to the criteria established by Congress as a predicate to entitlement for disability benefits. The LHWCA authorizes compensation not for physical harm, but for economic harm caused by a decreased ability to earn wages due to an injury. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). Congress defines "disability" in the LHWCA as "incapacity because of the injury to earn the wages which the employee was receiving at the time of the injury[.]" 33 U.S.C. § 902(10). Disability is conclusively established for certain injuries specified in the statute. 33 U.S.C. §§ 908(c)(1)-(c)(20), 908(c)(22). In all other cases, the LHWCA compensates for the loss in earning capacity occasioned by the injury. The LHWCA awards 66 2/3% of the difference between the pre-injury wages and the post-injury wage earning capacity. 33 U.S.C. §§ 908(c)(21), 908(e).

LHWCA disability is an economic concept; a product of the worker's physical capacities and the employment opportunities realistically available to him. The *Castro* decision has impermissibly introduced a new, non-statutory basis for awarding disability benefits--enrollment in a vocational rehabilitation program. The LHWCA as Congress designed it compensates only for the actual loss of wage earning capacity. When a worker with some post-injury earning capacity chooses not to work or chooses to work at less than her actual earning capacity, benefits are awarded based on the earning capacity and not the actual earnings. *Rambo II*, 521 U.S. at 127. The *Castro* court has authorized an award of total disability benefits to a worker who is *physically capable* of performing employment that is realistically available to him. Thus, a worker who ordinarily would not qualify for total disability benefits under the LHWCA is awarded the windfall of total disability benefits simply by virtue of his enrollment in a vocational

rehabilitation program. The meaning of "disability" has been changed without Congressional action.

The altered definition of "disability" advanced by the Director and adopted below upsets the benefit award process crafted by Congress. The LHWCA is a legislative compromise of the competing interests of workers and employers. The LHWCA provides injured workers with no-fault compensation while protecting employers from the increased liability associated with common-law tort suits. *PEPCO*, 449 U.S. at 281. Under the LHWCA, employers are liable to their injured employees only for the decrease in wage earning capacity resulting from the work injury. However, under this new *ultra vires* scheme created by the OWCP and approved by the court below, the employer is subject to additional liability not based on any loss in wage-earning capacity, but based solely on a worker's decision to participate in OWCP-sponsored vocational rehabilitation.

There is also no regulation supporting this award. The Secretary of Labor directs the vocational rehabilitation of permanently disabled employees. 33 U.S.C. § 939(c)(2). The Secretary has promulgated regulations outlining the LHWCA vocational rehabilitation procedures. *See* 20 C.F.R. §§ 702.501-702.508. However, the regulations contain no provisions that make an employer responsible for disability payments to workers enrolled in vocational rehabilitation programs. Since the Act has an elaborate benefit scheme crafted by Congress and is completely silent on any additional payments for vocational rehabilitation participants save a $25 weekly payment, 20 C.F.R. § 702.507, the OWCP and the court below committed reversible error by reading such a provision into the Act. The error is compounded by the failure of the OWCP to propose such a program through the regulatory system. This Court has eschewed loose interpretation of the LHWCA in the past. *See e.g. Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 (1952) ("We

are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability.' Congress knew the difference between 'disability' and 'injury' and used the words advisedly.").

This Court should review the decision below to restore the meaning of the LHWCA as it was enacted by Congress. The court below has allowed the OWCP to re-define "disability" under the LHWCA in a manner inconsistent with the statutory text and the implementing regulations.

2. The Director, OWCP's vocational rehabilitation procedures and the decision below impermissibly allow a District Director to make findings of disputed fact.

Under the OWCP vocational rehabilitation regime approved by the *Castro* decision, factual determinations directly affecting the extent of an employer's compensation liability are made by the District Director and her staff. This is contrary to the LHWCA and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500-96. Under the LHWCA the OALJ is the only body empowered to make findings of disputed fact relating to the award of compensation benefits. *Healy Tibbits Builders, Inc. v. Cabral*, 201 F.3d 1090, 1095 n. 7 (9th Cir. 2000). All hearings conducted under the LHWCA are subject to the APA, and must be conducted by an ALJ. 33 U.S.C. § 919(d); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). By affirming the award of total disability benefits, the court below upheld a compensation order based, at least in part, on factual determinations made by a non-ALJ from facts collected in a manner not in accordance with the APA.

3. The problem created below -- total disability awards based solely on a claimant's participation in vocational rehabilitation -- will only increase

Since the Fifth Circuit issued its *Abbott* decision in 1994, it has become increasingly common for employers to be held liable for total disability benefits simply on the basis of a claimant's full-time participation in vocational rehabilitation.[12] With the increasing number of U.S defense contractor employees working overseas, often in hostile and dangerous environments prone to injury, the industry believes that this trend is likely to continue. This, in turn, will increase the costs to LHWCA employer and insurance carriers in the form of higher premiums and higher assessments from the Special Fund. *See* 33 U.S.C. § 939(c)(2) (the administrative costs of the OWCP vocational rehabilitation program are paid by the LHWCA Special Fund, which is funded by assessments against LHWCA insurers). It is will also increase the costs for the U.S. government, particularly the Department of Defense (DoD). Employees of DoD contractors who are injured while working overseas are covered by the LHWCA and eligible for OWCP vocational rehabilitation. Because many DoD contracts are "pass-through" contracts, the increased costs attendant to the Director's extra-statutory award of compensation will be borne by the U.S. government. Even where the contractor is not operating pursuant to a "pass-through" contract, if the employee is injured by a "war hazard," the U.S. is still responsible for the disability compensation paid under the LHWCA (including any award for total disability during vocational rehabilitation) under the War Hazards Compensation Act, 42 U.S.C. §§ 1701-6.

4. The Director, OWCP's award of vocational rehabilitation benefits violates the Congressional policy enacted in the 1972 Amendments to the LHWCA

The OWCP's vocational rehabilitation procedures are contrary to the 1972 Amendments to the LHWCA. In 1972, the Congress separated the authority to perform adjudicative and administrative functions under the LHWCA into two separate bodies, the OALJ and the OWCP. *Healy*, 201 F.3d at 1093; *see also* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. Prior to 1972, deputy commissioners (the predecessor to District Directors) performed both functions. *Healy*, 201 F.3d at 1093. Congress' explicit policy behind this separation was the "belief that the administration of the . . . Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings." *Id.* at 1094 (quoting H.R. Rep. No. 92-1441, *reprinted in* 1972 U.S.C.A.A.N. 4698).

The OWCP guidelines and the award below suffer from a similar mixing of administrative and adjudicative functions. The District Director and her staff (and counselors contracted by her) create a vocational rehabilitation plan. The District Director then *ex parte* hears and rules on objections to her plan and approves her plan without any official record being created, without witnesses being sworn, without the opportunity for the employer to cross-examine anyone about facts that underlie the award. Then, under *Castro*, the plan is used to determine the nature and extent of an employer's financial responsibility under the LHWCA.

Congress made an abrupt and clear change to the LHWCA compensation award system in 1972. *See e.g. Crowell v. Benson*, 285 U.S. 22, 42-44 (1932) (explaining pre-1972 procedures). Congress removed district directors from the claims adjudication process in 1972 and transferred the responsibility to decide disputed cases to the OALJ, putting the trial process under the aegis of the APA. 33 U.S.C. § 919(d); H.R. Rep. 92-1441. At some stage in the proceedings below, General Construction company should

have been afforded the opportunity for a hearing before the OALJ, a body independent of the District Director, on the merits of the District Director's plan. By express act of Congress, adjudicatory functions are vested in the OALJ. For this policy to have any meaning at all, an ALJ must be free to inquire into any and all factors offered as evidence of disability under the LHWCA. Review of the decision below is necessary to return the LHWCA to the clear bright line established by Congress in the 1972 Amendments and prevent the *de facto* award of compensation by District Directors.

5. The system approved below evades both effective Congressional and judicial oversight and requires this Court's action to correct the errors inherent in the current program

This Court is in the best position to correct the error below. The process created by the Director and approved by the Court below is not subject to the scrutiny of the normal adversarial litigation process or effective Congressional oversight. It is a situation ripe for abuse and has allowed the program to develop into an extra-statutory award of benefits never authorized by Congress and contrary to the intent and plain meaning of the statute.

Once a LHWCA claimant has been referred to vocational rehabilitation, a rehabilitation counselor is assigned to develop a vocational rehabilitation plan. The counselor then submits the plan to the OWCP rehabilitation specialist. At the same time, the plan is sent to the employer and insurance carrier for comment. The employer has 14 days to submit objections and comments to the District Director. This is typically not enough time for the employer to retain their own vocational expert to evaluate the proposed program, have that expert generate a report analyzing the proposed program, and for that expert to survey the relevant

labor market for suitable alternative employment. The employer's objections are first considered by the OWCP rehabilitation specialist, who is charged with providing a written response and address any deficiencies shown by "well-founded" objections.

The plan is then considered by the District Director. If the District Director overrules the objections, she must provide a written explanation. An employer may appeal the award of vocational rehabilitation by filing a notice of appeal with the Benefits Review Board within 30 days of the date the approved plan is filed or reconsideration is denied. The Board reviews the District Director's approval of a vocational rehabilitation plan using an "abuse of discretion" standard. *Meinert v. Fraser, Inc.*, 37 BRBS 164, 167 (2003). An employer is not entitled to a hearing conducted before the OALJ in accordance with the APA on the merits, reasonableness, necessity, or propriety of the vocational rehabilitation plan. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 9 (2003). The ALJ is only allowed to formally award benefits during the period of vocational rehabilitation. *Meinert*, 37 BRBS at 167.

As a practical matter the OALJ can provide no effective judicial oversight of the vocational rehabilitation award. If, as was the case below, the District Director places a claimant in a full-time vocational program, the worker will be entitled to disability benefits even if there is suitable alternative employment actually available. *See Castro*, 401 F.3d at 972. Thus, factors directly impacting a LHWCA employer's financial liability are determined in a non-judicial, purely administrative, procedure and subject only to the lightest review, abuse of discretion review.

Similarly, the program as approved below is shielded from Congressional oversight. The administrative costs of the vocational rehabilitation program are paid by the

LHWCA Special Fund. 33 U.S.C. § 939(c)(2). The Special Fund is not funded by Congress, but from moneys collected from LHWCA employers and insurance carriers. 33 U.S.C. § 944(c). Thus, unlike most government programs, this program is not dependent upon annual Congressional appropriations and the attendant oversight.

Finally, this Court is in the best position to correct the problems created by the extra-statutory award of compensation created by the Director. The immediate decision below cannot be corrected absent an *en banc* decision by the Ninth Circuit. Even this would not be enough to provide true relief to LHWCA employer and insurance carriers. The maritime industry is not a local or regional industry and, while the operations of individual employers may be limited in geographic scope, LHWCA insurers write risks on a nationwide basis and are liable for claims occurring throughout the country. An *en banc* reversal from the Ninth Circuit would only alleviate a portion of the problem. The Board, whose jurisdiction extends to all LHWCA claims, has stated that the *Abbott* opinion is to be applied to all claimants in all cases arising under the LHWCA. *Castro v General Construction Co.*, 37 BRBS 65, 69-70 (2003). True relief requires an overriding decision of nationwide application that only this Court can provide.

6. The program approved below has been consistently applied in a manner inconsistent with the applicable federal regulations

The vocational program is ostensibly subject to federal regulations promulgated by the Secretary of Labor. *See* 20 C.F.R. §§ 702.501-702.508. However, the reality of the program is that these regulations do not provide an effective control on the program and that the program is being administered in a manner inconsistent with the regulations.

Vocational rehabilitation is reserved for permanently disabled workers. 20 C.F.R. § 702.501. The stated goal of vocational rehabilitation is to return the employee to remunerative employment within a "short" period of time, and it must restore or increase the employee's wage-earning capacity. 20 C.F.R. § 702.506.[13] From the beginning, this regulatory criteria has been effectively ignored and the Benefits Review Board and the federal courts have refused to enforce the regulatory limitations. Claimants have been awarded vocational rehabilitation before there disability became permanent. *See e.g. Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 196 (2001). The plans approved by District Directors are not "short" and an employer's extra-statutory liability often persists for years. *See e.g. Abbott*, 40 F.3d at 124 (4 year program); *Bush v. I.T.O. Corp.*, 32 BRBS 213, 213 (1998) (3 year program).

7. The Ninth Circuit's decision creates a perverse incentive for workers to seek public resources in lieu of returning to work with the employer or in suitable alternate employment

The decision below sticks the employer with the cost of an unauthorized total disability award. But, the Director is responsible for paying for some of the vocational rehabilitation services. 33 U.S.C. § 939(c)(2). This most often includes the appointment of a Vocational Rehabilitation Counselor (VRC) by the Director. The private VRC is paid an hourly rate, often in excess of $70 per hour, by the federal government to work with the injured worker to develop a vocational plan, discuss options for retraining, or attempt to

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[13] The full regulation reads: "Vocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially." 20 C.F.R. § 702.506.

return to other employment. The Director may also pay for any equipment reasonably necessary for the injured workers' retraining program, *e.g.*, books or a computer, while the employer is expected to pay total disability benefits with only a modicum of input. 33 U.S.C. § 939(c)(2). These expenditures may go unnoticed by Congress because they are paid from an assessment against LHWCA employers and insurance carriers. 33 U.S.C. § 944(i)(2).

The program approved below is directly counter to the goals of vocational rehabilitation and the LHWCA. By creating an award of benefits without regard to any actual loss of wage earning capacity, it creates the incentive to refuse to return to the work force. Therefore, any injured worker who wishes to extend his benefits beyond his normal entitlement can be considered for a vocational rehabilitation program, even where there is suitable employment actually available for them. Conversely, those workers who do take the initiative to return to work are punished because they lose benefits otherwise available to them. *See e.g. Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998) (worker who obtained part-time employment on her own was denied benefits during vocational rehabilitation because of her employment).

Vocational rehabilitation is designed to return employees to work at restored or increased wage earning capacity. 20 C.F.R. § 702.506. However, the extra-statutory award creates an incentive for injured workers to ignore higher paying jobs actually available to them post-injury in favor of vocational retraining to obtain entry level work in a new field. *See Bush*, 32 BRBS at 213. In *Bush*, the claimant had a college degree prior to his injury, and his employer established that claimant had the capacity post-injury to earn greater than the minimum wage without retraining. *Id.* at 214-5. Nevertheless, the Board upheld the award of total disability benefits during three years of retraining for an entry

level nursing position. *Id.* at 218. It is only the availability of disability benefits, regardless of earning capacity, during enrollment that twists the LHWCA away from its remedial purposes.

Any retraining program will likely deprive the worker of the option to return to work, and the worker will be paid total disability benefits while he goes to school under the Ninth Circuit's opinion. The employer is not given a reasonable opportunity to conduct discovery or cross-examine witnesses in the vocational plan approval process; therefore, there exists an opportunity for injured workers or their counsel to use the vocational program to bootstrap an entitlement to total disability without the scrutiny of a formal hearing on disputed issues of fact.

Castro, a carpenter and pile driver, was enrolled in lengthy re-education and training program in hotel management to start as an entry-level motel clerk earning $16,000 per year, and sometime in the future possibly be elevated to hotel management. *Castro*, 401 F.3d at 966. In a similar case, David Clark, a diesel mechanic; was also awarded a vocational plan by the same Director, including two years of remedial education at a community college and technical school training. Mr. Clark eventually quit the vocational program after several weeks of total LHWCA disability benefits not because it was too difficult or because he found a job, but because he was awarded Social Security Disability benefits. *Clark v. Chugach Development Corp.*, BRB No. 04-0890, Slip. Op. at 4 (August 18, 2005) (unpublished). In *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286 (4th Cir. 2002), the worker was offered a job senior engineering analyst that paid more than the job in Graphics Communications that he was training for, but he turned it down out of job security concerns. *Brickhouse*, 315 F.3d at 290.

Therefore, without the scrutiny of the time-tested adversarial process or Congressional oversight, injured workers or their counsel have the liberty to pursue extra-statutory disability benefits on the employer's and the federal government's dime.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 05-371

In The Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

The Property Casualty Insurers Association of America ("PCI") respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari filed in this case. Written consent has been filed with the Court by Petitioners and for Respondent Castro. Because no consent was filed independently by the Solicitor General, this motion is filed in the event that the Respondent's filed consent does not include consent by the Solicitor General as well.

The PCI is a trade group representing more than 1,000 property and casualty insurance companies and is the leading voice of the insurance industry. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry.

Numerous PCI member insurance companies have a direct interest in the proper administration of employee injury claims covered by the Longshore and Harbor Workers' Compensation Act[1] (hereinafter the "LHWCA" or the "Act"). The outcome of this case will have a significant financial impact on those PCI member insurers and policyholders as well. Because of the potential financial impact this case may have on the insurance industry, PCI and its member insurers have an interest in the determination of the rights and liabilities of employers and employees concerning vocational rehabilitation.

The specific issue presented in this case is whether a claimant is entitled to total disability payments even in circumstances where the claimant is participating in vocational rehabilitation. PCI and its members assert that the LHWCA does not provide for benefits under such circumstances. PCI and its members assert that if the LHWCA is construed to afford benefits to a claimant where the claimant is participating in vocational rehabilitation, that construction will create a disincentive for claimants to promptly return to work, a result that will be directly in conflict with the goal of the Act.

PCI respectfully requests this Court should grant this motion and permit PCI to file its brief *amicus curiae*, and

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[1] 33 U.S.C. § 901, *et seq.*

that this Court should grant the petition and overrule the decision by the appellate court below.

Respectfully submitted,

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BRIEF OF THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF THE *AMICUS CURIAE*[1]

The PCI is a trade group representing more than 1,000 property and casualty insurance companies and is the leading voice of the insurance industry. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry.

Numerous PCI member insurance companies have a direct interest in the proper administration of employee injury claims covered by the Longshore and Harbor Workers' Compensation Act[2] (hereinafter the "LHWCA" or the "Act"). The outcome of this case will have a significant financial impact on those PCI member insurers and

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to this brief's preparation and submission.

[2] 33 U.S.C. § 901, *et seq.*

policyholders as well. Because of the potential financial impact this case may have on the insurance industry, PCI and its member insurers have an interest in the determination of the rights and liabilities of employers and employees concerning vocational rehabilitation.

The specific issue presented in this case is whether a claimant is entitled to total disability payments even in circumstances where the claimant is participating in vocational rehabilitation. PCI and its members assert that the LHWCA does not provide for benefits under such circumstances. PCI and its members assert that if the LHWCA is construed to afford benefits to a claimant where the claimant is participating in vocational rehabilitation, that construction will create a disincentive for claimants to promptly return to work, a result that will be directly in conflict with the goal of the Act.

SUMMARY OF ARGUMENT

The *amicus curiae* submits in this brief that the Act does not support the payment of temporary total disability during vocational rehabilitation. On that basis, the Ninth Circuit committed reversible error and this court should reverse the decision below and should rule in favor of Petitioners.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT ERRONEOUSLY HELD THE LHWCA PERMITS TEMPORARY TOTAL DISABILITY BENEFITS ARE TO BE PAID WHILE A CLAIMANT UNDERGOES VOCATIONAL REHABILITATION.

The Ninth Circuit committed reversible error when it held that participation in vocational rehabilitation renders a claimant totally disabled. The Ninth Circuit's decision is not supported by the language of the Act. The conclusion reached by the Ninth Circuit, if left intact, will improperly expand the total disability provision of the LHWCA far beyond what Congress intended. The Ninth Circuit's erroneous expansion of the LHWCA should be flatly rejected by this Court and should be reversed.

The LHWCA sets forth four classifications of disability: Each of these four classifications of liability are discussed below. None of these classifications of liability include any provision that provides a claimant is to be deemed as being totally disabled while undergoing vocational rehabilitation.

The LHWCA defines "disability" in the following manner:

> "[I]ncapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Total disability may occur as a result of either a scheduled or unscheduled injury where claimant retains no wage-earning capacity. A "disability" under the LHWCA constitutes a "total" disability when the claimant is unable

to perform any suitable alternative employment or where suitable alternative employment is not available.

The first classification of disability in the LHWCA is "permanent total". 33 U.S.C. § 908(a) states:

> Compensation for disability shall be paid to the employee as follows: (a) Permanent total disability: In case of total disability adjudged to be permanent 66 ⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

A "permanent total" disability under 33 U.S.C. § 908(a) is clearly limited to circumstances where the claimant has lost his or her hands, feet, legs or eyes. 33 U.S.C. § 908(a) also provides there are other circumstances where a permanent total disability may be found, and those injuries should be evaluated on a case by case basis. However, 33 U.S.C. § 908(a) does not provide that a "permanent total" disability may exist where the injured claimant is undergoing vocational rehabilitation.

The second classification of disability in the LHWCA is "temporary total" disability. 33 U.S.C. § 908(b) states:

> Temporary total disability: In case of disability total in character but temporary in quality 66 ⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

No provision is made in 33 U.S.C. § 908(b) that a claimant is deemed to be disabled while undergoing vocational rehabilitation.

The third classification of disability in the LHWCA is "temporary partial" disability. 33 U.S.C. § 908(e) states:

> Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wage before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 908(e)

The fourth and final classification of disability under the LHWCA is "permanent partial" disability. According to the LHWCA, "permanent partial" disabilities can be classified in one of two ways – scheduled or unscheduled disability. A scheduled injury is defined in § 8(c)(2) of the LHWCA. Scheduled permanent partial disability benefits are to be paid according to specific provisions contained in the schedule. Where a specific type of injury does not fall within the scheduled injury provisions of § 8(c)(2), the injury is referred to as an "unscheduled" permanent partial disability. The importance of this classification is that benefits paid for an unscheduled permanent partial disability are calculated using the injured employee's wage-earning capacity.

None of the foregoing disability classifications supports the decision by the Ninth Circuit. The Ninth Circuit failed to properly apply the concept of what the term

"disability" means within the context and plain language of the LHWCA. Rather than strictly applying and enforcing the clear and unambiguous disability provisions of the LHWCA, the Ninth Circuit instead basically redefined the definition of "disability" in the LHWCA to include an injured claimant's participation in vocational rehabilitation. The Ninth Circuit's decision changes the focus from the type of injury and the severity of the injury to whether the injured party is participating in vocational rehabilitation. This is not what LHWCA provides and clearly by the language of the LHWCA was not Congress' intent. The Ninth Circuit's expansive reading and application of the LHWCA should be flatly rejected in this case, and Petitioner's petition should be granted to afford Petitioners and their *amici* the opportunity to more fully explain why the Ninth Circuit's decision was erroneous and why it constitutes reversible error.

For these reasons, and for those not set forth herein but which are stated in the Petition for Writ of Certiorari, the Petition should be granted.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES RAISED BY THIS APPEAL WILL HAVE A WIDESPREAD IMPACT ON BUSINESS AND INDUSTRY

The decision by the Ninth Circuit will not be limited to the litigants in this appeal. The issue presented by the Petition for Writ of Certiorari is of wide-reaching importance to other industries. The insurance industry is particularly interested in this issue, because the Ninth Circuit's decision threatens to create inconsistent interpretations of the LHWCA. The Petition accurately described the inconsistencies between the Ninth Circuit's opinion